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Federal Communications Commission
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Policies and Rules for the	)	**IB Docket No. 98-21**
Direct Broadcast Satellite Service	)	

REPLY COMMENTS
OF THE
SMALL CABLE BUSINESS ASSOCIATION

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SUMMARY

Cable ownership of direct broadcast satellite ("DBS")/direct-to-the-home ("DTH") providers has recently received much attention in the context of the Primestar merger and reorganization. Despite the debate surrounding Primestar, the question remains whether evidence exists to support the necessity of a blanket cross-ownership ban. It does not.

The comments in this proceeding have uniformly focused on the issues implicated by direct cable or DBS/DTH ownership in the other. Direct cross-ownership occurs infrequently. Another type of cross-ownership happens much more frequently — third-party investors. The Small Cable Business Association ("SCBA") has significant concerns regarding the impact on third-party investors who become ineligible to provide capital to both cable and DBS/DTH interests. The result could foreclose important sources of capital to small cable operators while at the same time not advance any of the competitive goals sought by the Commission.

All comments have also failed to consider the adverse impact that a blanket prohibition could have on collaborative efforts by cable-DBS/DTH providers. These collaborative efforts will help to bring a greater number of services, as well as technologically advanced services, to parts of rural America where the laws of economics would otherwise prevent it.

SCBA sees little that a blanket cross-ownership ban would accomplish, other than invoking the law of unintended consequences. SCBA strongly urges the Commission to continue its current regulatory strategy and deal with ownership issues on a case-by-case

basis. Any more radical tact will likely cause significant and unintended harm to viewers in rural America.

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Policies and Rules for the Direct Broadcast Satellite Service	))	**IB Docket No. 98-21**

REPLY COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

The Commission has requested comment on critical issues associated with restrictions on the ownership of direct broadcast satellite ("DBS") and direct-to-the-home ("DTH") providers. DBS and DTH providers represent a major source of competition to small cable operators in rural America. Nevertheless, this does not mean that small cable businesses endorse such a proposal — they do not.

The Small Cable Business Association ("SCBA"), the only voice of smaller, independent cable businesses, has serious concerns that the proposed blanket cross-ownership ban will harm access to the capital markets and undermine critical collaborative efforts small cable has underway. SCBA outlines in these comments its concerns that a blanket cross-ownership ban would accomplish little, except to prevent the delivery of new and enhanced services and technologies to rural America.

II. A DBS/CABLE CROSS-OWNERSHIP LIMITATION COULD ADVERSELY AFFECT VIEWERS IN RURAL AMERICA.

Virtually all comments in this proceeding have focused on significant direct cross-ownership relationships. For example, some comments discuss the impact of large cable companies owning Primestar.[1] Others focus on the issues that arise from a DBS/DTH provider owning, and presumably controlling, a cable provider. These comments miss a critical issue - common ownership of a cable operator and a DBS/DTH provider by a third party.

In most legislative and administrative actions, perhaps the most often invoked principle is the law of unintended consequences. Other than prohibiting the obvious direct ownership, a traditionally crafted cross-ownership ban threatens to disqualify critical capital market participants as well as choke-off budding cable/DBS partnerships that will greatly enhance services available to rural America. The Commission must consider these consequences when weighing any perceived advantage of a blanket cross-ownership ban.

A. A Cross-Ownership Ban May Limit Capital Availability to Small Cable.

Access to capital remains critical to both the success of small cable and its ability to provide new, enhanced and quality services to customers in rural America. Diligent work by small cable after the 1992 Cable Act[2], coupled with the Commission's *Small*

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[1]*See, e.g., Comments of DIRECTV, Inc.* at 8 and *Comments of Echostar Communications Corporation* at 4-5.

[2]The Cable Television Consumer Protection and Competition Act of 1992, Codified at 47 U.S.C. § 520, *et. seq.*

System Order[3], finally restored its access to the major capital markets. SCBA has significant concerns that any general ban on cable-DBS/DTH cross-ownership may foreclose important sources of capital.

1. Cross-ownership bans typically limit third-party investors.

The comments' uniform focus on the wisdom of a direct investment by a cable operator in a DBS/DTH provider, or vise versa, limits the Commission's analysis. The circumstance more frequently encountered involves the equity investor who holds a non-controlling interest in either a DBS/DTH provider or a cable operator and desires to make equity investments in the other.

Restrictions on ownership typically apply to those with "attributable" ownership interests.[4] Consequently, any party holding a sufficient equity interest in *either* a cable operator or a DBS/DTH provider would constitute a restricted party under a blanket cable-DBS/DTH cross-ownership ban.

2. The Commission's current cable-LMDS cross-ownership ban exemplifies the potential impact on third-party investment.

The Commission's current cross-ownership rules regarding local multipoint distribution services ("LMDS") provide a good example of the adverse impact similar rules

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[3] *Sixth Report and Order and Eleventh Order on Reconsideration*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; MM Docket Nos. 92-266 and 93-215 (released June 5, 1995).

[4] *See, e.g.*, 47 CFR § 101.1003(a). ("[N]o incumbent LEC or incumbent cable company. . . nor any entity owning <u>an attributable interest</u> in an incumbent LEC or incumbent cable company, shall have an <u>attributable interest</u> in an LMDS license. . . ." (Emphasis added.))

with respect to cable and DBS/DTH might have. As noted above, the rules apply to anyone holding an "attributable interest" in either an LMDS license, cable system or local exchange carrier ("LEC"). The Commission's rules define an "attributable interest" as one that either provides a "controlling interest"[5] or "any stock interest amounting to 20 percent or more of the equity. . . ."[6]

This cross-ownership ban has precluded some institutional investors and other venture capitalists from providing capital to small cable operators. For example, a potential investor that holds a 25% equity interest in an LMDS operator could not provide capital to a small cable operator if at least 10 percent of the population of the LMDS authorized service area falls within any portion of the cable operator's franchised service area. Several small cable operators have already encountered this restriction when attempting to secure capital from traditional investors in communications properties.

3. A cable-DBS/DTH cross-ownership ban would disqualify many potential investors.

The degree of burden a cross-ownership prohibition imposes typically depends on the frequency with which service areas overlap. Consequently, an investment in an LMDS provider with only a single area of authorization will typically only disqualify investment in the local cable operator. If a small operator with only a single or a handful of systems exists, the harm imposed by the cross-ownership ban becomes minimal. The likelihood

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[5] 47 CFR § 101.1003(e)(1).

[6] 47 CFR § 101.1003(e)(2) (emphasis added).

of limitations on access to capital increases with the number of areas served by either the LMDS or cable provider.

The large service areas of most DBS/DTH providers gives rise to SCBA's concerns. Full-CONUS providers have the ability to serve at least the entire 48 contiguous states. Other DBS/DTH licenses permit service to large geographic regions of the United States. This will result in either a certain overlap, or at a minimum, a high probability of service area overlap. Consequently, <u>an investor holding an "attributable interest" in any DBS/DTH venture, will effectively preclude itself from any investment in small cable</u>.

4. The Commission should not impose any cross-ownership ban that would disqualify third-party investment.

The record contains no evidence of any harm that this third-party cross-ownership would inflict on competition. To the contrary, SCBA has placed on the record evidence that a cable-DBS/DTH cross-ownership ban is poised to further restrict access to capital vital to the ability of small cable to continue providing quality services to its customers and to offer new services in the future. SCBA strongly urges the Commission to avoid any cable-DBS/DTH cross-ownership ban that would impair the ability of third-party investors to invest in more than one multichannel video programming delivery technology.

B. A Cross-Ownership Ban Could Preclude Cable-DBS/DTH Cooperative Ventures that would Benefit Viewers in Rural America.

Small cable businesses and DBS/DTH providers have undertaken discussions and development of different efforts to enhance the quality and quantity of services provided to rural America. Many small cable businesses provide service to rural America. Often, these systems serve small numbers of subscribers, making the economics of intensive capital spending unrealistic. Consequently, these small cable business owners must seek non-traditional alternatives to bring advanced services to their customers. One way to accomplish this is to work cooperatively and integrate traditional cable and DBS/DTH satellite services.

1. The fundamentally different per-subscriber cost structures of cable and DBS/DTH explain the incentive for collaboration.

The cable and DBS/DTH economics of serving rural areas are diametrically opposed. Small cable businesses must spread their fixed capital costs over the *local* subscriber base. For example, the cost of additional headend equipment, as well as physical plant, divided by the number of customers yields a highly variable per subscriber cost. Where small cable businesses serve small clusters of subscribers in low-density areas, the costs per subscriber can become staggering. Consequently, the large capital expenditures necessary to bring certain new services to these areas often makes them economically infeasible.

DBS/DTH, on the other hand, incurs costs on a national basis. It has no local plant or facilities. This means that the cost for providing service to each DBS/DTH customer becomes uniform on a national basis. Whether to an isolated section of West Virginia or to a customer in the heart of Manhattan, the DBS/DTH cost of providing service remains completely independent of the density of homes in a particular area. This allows DBS/DTH to service rural areas at an average cost unavailable to cable operators. Why then, does not DBS/DTH simply overrun small cable businesses? The answer can be found in the unique local programming of small cable and its local customer service orientation.

2. Combining services provides a full array of programming.

Both cable and DBS/DTH offer certain unique programming to residents of rural America. Cable provides local programming and much traditional cable programming. DBS/DTH provides the ability for new services and digital services in a cost-effective manner.

Small cable businesses are often the only source of local off-air programming available to remote and often geographically insular areas. Despite the plans of Echostar and potentially other DBS providers to deliver local programming, technology and economics limits these plans to only the most densely populated geographic areas for the foreseeable future.[7] Consequently, small cable businesses will remain the sole provider of multichannel video programming services to offer local off-air broadcast signals. DBS/DTH providers, on the other hand, can provide a vast array of national programming services to homes regardless of location. Combining these two services results in the availability of a complete array of services to customers in rural America.

3. Collaborative efforts will benefit rural America.

Fundamental laws of economics make it impossible for many cable systems serving pockets of rural subscribers to install and deploy additional services, especially those involving new technologies. Small cable business, however, have found innovative ways around these seemingly insurmountable hurdles. For example, many small cable

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[7] Echostar announced only limited plans to deploy transmission of local broadcast signals into local markets, limiting the markets to the 20 largest. *Testimony of Echostar Communications*, on Copyright Licensing Regimes Covering Retransmission of Broadcast Signals before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, February 4, 1998 at 5.

operators have availed themselves of the "Headend In the Sky" technology to reduce prohibitive investment in their headends and yet still be able to offer additional services.

Only collaborative efforts to devise ways to deliver additional services to rural America will give citizens in those areas the ability to receive both local and national programming. Prohibition of collaborative efforts will force those residents to choose, often between: (1) local service and programming; and (2) a greater quantity of national programming.

The Commission should continue to foster localism in the provision of multichannel video programming services. Small cable businesses remain the sole source of local programming. Only cable provides local broadcast stations, local advertising, local origination programming, local public, education and government programming and local emergency alert capabilities. Collaborative efforts with small cable providers will preserve the availability of local programming to residents of rural America.

4. Commission cross-ownership rules might prohibit collaborative efforts.

Returning again to the Commission's LMDS rules as an example, a review indicates that the rules prohibit a wide array of collaborative efforts. For example, the rules prohibit any type of joint management arrangement or joint marketing agreement.[8] The rules further clarify that the prohibited arrangements include those where the either of the prohibited cross-owners can significantly influence the nature or types of services offered,

[8] 47 CFR § 101.1003(9).

the terms upon which services will be offered or the prices charged for such services.[9] These provisions make collaborative efforts virtually impossible.

5. Small cable businesses have various collaborative efforts in progress or already launched.

Collaborative efforts between small cable and DBS/DTH are more than merely speculative. Small cable businesses have pursued a number of collaborative efforts with DBS/DTH providers. SCBA provides two examples: (1) digital add-on services; and (2) joint marketing.

a. Digital add-on services (a.k.a. "Cable Plus").

One way for small cable businesses to add programming and new technology involves the supplementation of signals at the subscriber's home. This strategy eliminates prohibitively expensive plant and headend upgrades. Prior to the announcement of the Primestar merger, small cable businesses had made significant progress developing a product with Primestar referred to as "Cable Plus."

Cable Plus was a digital tier of supplemental services that cable operators could receive directly at the subscriber's home and integrate the products into the cable operator's delivery of services. The original concept of Cable Plus involved a service that cable operators would define, price and brand. Since the announced merger, Primestar has withdrawn Cable Plus and later introduced a new service with terms unacceptable to most cable operators. That aside, however, other DBS/DTH providers have undertaken discussions to provide the service that small cable businesses had hoped Cable Plus would provide.

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[9] *Id.*

b. Multiple dwelling unit properties.

Small cable businesses that serve multiple dwelling unit buildings have also begun entering into joint venture contracts. These contracts go much further than traditional transport agreements. These contracts make additional tiers of service available to residents of those units, either on a bulk or on an individual basis.

C. Relevant Markets

The Commission raises a number of issues regarding the proper definition of the relevant product and geographic markets. SCBA addressees these issues briefly.

1. Relevant product market.

The Commission asks whether it should adopt the conclusion of the *1997 Competition Report* that an appropriate market definition is one that includes all multichannel video programming providers. SCBA agrees with this definition.

Small cable businesses often find themselves in direct competition with DBS/DTH providers. The fact that It remains somewhat unusual to find a rural subscriber receiving both cable and DBS services, absent some coordination between the two products, confirms this.

For many years, various DBS/DTH promotions have referred to their services as "cable" services. For example, for several years, Primestar advertised in the United States Postal Service's Mover's Guide. This full-page advertisement invited persons moving to get in contact with the cable operator in their new area by calling 1-800-NUCABLE. This number, however, did not connect the caller to a cable operator, but usually to the local Primestar distributor.

DBS/DTH providers have gone head-to-head for years with cable, even to the point of characterizing their services as "cable." Further, the absence of significant numbers of subscribers to both cable and DBS/DTH verifies that consumers view cable and DBS/DTH as providing essentially the same, or at a minimum, as highly substitutable products. Consequently, the Commission should continue to treat cable and DBS/DTH as serving the same product markets.

2. Geographic market.

SCBA concurs with the Commission that the relevant geographic market for DBS/DTH is measured on a local basis. Different providers of service exist in each local market. The choices that a consumer living or working in that community will make will depend upon the options available in that market. The precise competitive offerings in another city will bear no influence to the consumer's choice in the market in which he or she lives.

The Commission also asks what effect the limitations imposed by the Satellite Home Viewing Act ("SHVA") on DBS providers' marketing efforts have on defining the local geographic market.[10] The answer is none. SHVA merely prohibits a DBS/DTH provider from importing a duplicative distant network signal into a local market. SHVA does not, by itself, impact the definition of local markets. SHVA merely serves to protect legitimate local programmers from unreasonable harm inflicted by the importation of duplicative distant network signals.

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[10] *Notice* at ¶ 64.

III. CONCLUSION

Given the small number of DBS/DTH providers and the potential harm that a blanket cross-ownership ban could inflict on customers in rural America, SCBA strongly urges this Commission to maintain the status quo. The most realistic and most effective regulation of DBS/DTH with respect to ownership should remain as it is now — administered on an ad hoc, as needed, basis. Any more significant regulation threatens to undermine the ability of small cable operators to access capital markets and to bring new services to rural America.

Respectfully submitted,

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